

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
2 FOR THE COUNTY OF MULTNOMAH  
3 THE ESTATE OF MICHELLE )  
SCHWARZ, deceased, by and )  
4 through her Personal )  
Representative, RICHARD )  
5 SCHWARZ, )  
)  
6 Plaintiff, ) Circuit Court  
) Case No. 0002-01376  
7 vs. )  
)  
8 PHILIP MORRIS INCORPORATED, ) Appellate Case  
a foreign corporation, and ) No. A118589  
9 ROTH'S I.G.A. FOODLINER, )  
INCORPORATED, an Oregon )  
10 corporation, )  
Defendant. )

11  
12 TRANSCRIPT OF PROCEEDINGS  
Volume 21-A  
13 10:00 a.m. - 11:15 a.m.  
14

15 BE IT REMEMBERED, That the above-entitled  
16 matter came on regularly for Jury Trial and was heard  
17 before the Honorable Roosevelt Robinson, Judge of the  
18 Circuit Court of the County of Multnomah, State of  
19 Oregon, commencing at 10:00 a.m., Wednesday,  
20 February 6, 2002.

21 \* \* \*  
22 Katie Bradford, CSR 90-0148  
Official Court Reporter  
23 210-A Multnomah County Courthouse  
1021 SW Fourth Avenue  
24 Portland, Oregon 97204  
(503) 988-3549  
25

1 APPEARANCES:  
2 Mr. D. Lawrence Wobbrock, Attorney at Law,  
Mr. Charles S. Tauman, Attorney at Law,  
3 Mr. Richard A. Lane, Attorney at Law,  
Appearing on behalf of the Plaintiff;  
4  
5 Mr. James L. Dumas, Attorney at Law,  
Mr. John W. Phillips, Attorney at Law,  
6 Appearing on behalf of Defendant  
Philip Morris, Incorporated and Defendant  
7 Roths I.G.A. Foodliner, Incorporated.  
8

9 \* \* \*  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

23  
24  
25  
  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Index	
GENERAL INDEX	
VOLUME 21-A	
	Page No.
February 6, 2002	
10:00-11:15 a.m. Proceedings	4
Colloquy, re: Juror Baurer	4
Plaintiff's Opening Statement	
(Continued from 2-5-02)	11
Reporter's Certificate	44

\* \* \*

4

1 (Wednesday, February 5, 2002, 10:00 a.m.)  
2 P R O C E E D I N G S  
3 (Whereupon, the following proceedings were  
4 held in open court, out of the presence of the jury:)  
5 THE COURT: All right. Let's go on the  
6 record.  
7 MR. WOBBROCK: Your Honor has informed us of a  
8 problem with a juror who now has indicated that there  
9 may be an employment opportunity, or there is an  
10 employment opportunity and that she wants to take  
11 advantage of that, and she can't wait for six weeks.  
12 Judge, we're very, very concerned about this.  
13 We tried to voir dire the jurors as carefully as we  
14 could about this sort of issue. We spent a lot of  
15 time in voir dire. If on the second day of the trial,  
16 after the jury has been empaneled, one juror leaves,  
17 and this case which is already now -- I am not blaming  
18 anyone, but we're behind, and could go longer than we  
19 anticipate.  
20 I am concerned and so is my co-counsel that  
21 this is going to send a message to the rest of that  
22 panel that bad backs and aching shoulders and  
23 grandchildren that are having school plays or whatever  
24 is going to somehow become of importance to allow them  
25 to not fulfill their duty as a juror. And I know that

5

1 is pretty harsh, Judge, but I am very concerned.  
2 This is going to be a long trial, and if we  
3 start out the second day with something that we

4 questioned people about and she said she could do  
5 this, and as I stand here, Judge, I have no idea if  
6 she is good for us or bad for us. That's not the  
7 issue. I am concerned about the message that it sends  
8 to the rest of that panel. That's what I wanted to be  
9 heard about.

10 THE COURT: Thank you.

11 Does defense wish to be heard any further on  
12 this matter?

13 MR. DUMAS: Your Honor, I understand  
14 Mr. Wobbrock's concern. I have the same concerns. On  
15 the other hand, we certainly don't want a juror who is  
16 not going to be able to concentrate on the evidence or  
17 the Court's instructions.

18 I do agree, though, that a juror should not be  
19 excused for minor matters, and that's why I suggested  
20 to the Court that the Court ought to talk to Ms. Bauer  
21 and determine whether or not this is a type of issue  
22 that really warrants her being excused. If that's the  
23 Court's decision, then perhaps some comment by the  
24 Court to the other jurors that what you did was an  
25 extraordinary thing and you're not planning on doing

6

1 it for minor inconveniences, or even major  
2 inconveniences in the future, something like that.

3 THE COURT: All right, thank you.

4 What the Court is going to do is bring all the  
5 jurors in instead of just this one person, so that she  
6 can make her presentation, and then I can encourage  
7 other jurors that with thorough questioning that they  
8 were given, we were trying to find out from them,  
9 could they do a six to eight-week trial, and we can't  
10 afford to just start letting jurors go as they start  
11 remembering now things that they should have  
12 remembered when you were questioning them.

13 But I don't want a juror here that's really  
14 upset because she doesn't want to be here, and she  
15 feels that she is losing a job opportunity that may  
16 not be available to her any time in the near future.

17 MR. WOBBROCK: Your Honor, I think she agreed  
18 with us that she would be here for the duration. And  
19 I would ask the Court -- and I know this is not the  
20 Court's inclination -- but I would ask the Court,  
21 "We've gone through this, Ms. Bauer, and I'm sorry,  
22 you're with us." I think that particularly if we do  
23 this in open court, it is going to educate the rest of  
24 the jurors about how they can deal with the Court if  
25 they need to to get out of here.

7

1 This is a solemn matter for everyone, and I  
2 just -- I think it's going to be trying on this jury,  
3 it's trying on the lawyers, it's trying on the Court  
4 and the Court staff. It's difficult, and we have to  
5 have people who are willing to stick it out.

6 THE COURT: Right. I understand you, counsel.  
7 (Pause in proceedings.)

8 MR. WOBBROCK: I didn't mean to say, Your  
9 Honor, that I disagreed with the Court's judgment on  
10 that. That's not my role, you understand.

11 THE COURT: All right. Thank you, counsel.  
12 If there's nothing further, we'll bring the jury in.

13 Ms. Murphy, will you bring them in, please;  
14 everybody, the whole panel.

15 (The following proceedings were held in open  
16 court, the jury being present at 10:11 a.m.)  
17 THE COURT: All right. Good morning, members  
18 of the jury. The Court will apologize. We had a  
19 matter that went longer than the Court had  
20 anticipated. I thought we'd be done before now, but  
21 we are here, but I think I have one other issue that  
22 the Court needs to deal with.  
23 Do we have a juror that had something with  
24 employment, just received employment, a job or  
25 something like that? Will you tell us your name and

8

1 your number, please?  
2 JUROR BAUER: Heather Bauer, No. 1699.  
3 THE COURT: All right. And won't you just  
4 briefly explain to the Court what the situation is.  
5 JUROR BAUER: Last night I received a job  
6 offer, and they are unable to hold the position for  
7 six to eight weeks until the trial is over.  
8 THE COURT: Did you ask them would they do it?  
9 JUROR BAUER: Yes. And they indicated that  
10 they needed to fill the position immediately.  
11 THE COURT: Were you aware of that potential,  
12 because the counsel was asking a lot of questions,  
13 because we all were concerned about getting people  
14 seated who could serve six to eight weeks.  
15 Did you forget about that?  
16 JUROR BAUER: No. It wasn't something that  
17 they offered me until just last night. And I did, at  
18 some point, they asked me if I was happy with my  
19 career and if I was looking for something else, and I  
20 indicated that I was, but I didn't -- I had no idea  
21 that it would be so soon. I had no idea I would find  
22 something right away.  
23 THE COURT: What type of employment? You  
24 don't have to go into it, but what type of employment  
25 are you going into?

9

1 JUROR BAUER: An admin position opening up  
2 into a marketing position.  
3 THE COURT: What size company: Small, midsize  
4 or large?  
5 JUROR BAUER: Small.  
6 THE COURT: Small company.  
7 JUROR BAUER: Yes.  
8 THE COURT: And you feel that this is an  
9 opportunity that you really need to take advantage of  
10 at this time?  
11 JUROR BAUER: I do. It's a really good  
12 opportunity for me.  
13 THE COURT: What the Court is going to do, the  
14 Court is going to very, very reluctantly allow you to  
15 be released from these duties, but I am doing it  
16 reluctantly because I don't want to set a pattern. We  
17 have other people sitting there listening to us go  
18 through this procedure, and I don't want people to  
19 start thinking about, oh, my grandson is going to be  
20 in a grade school play and he's going to be Macbeth.  
21 And I've just got to take the time to go see him. Or  
22 I've got an opportunity to go down to San Diego and  
23 play in the sun, and I'd rather be there than here in  
24 Portland, so get me out of here.  
25 We need the jurors that we have. We need to

1 the commitment that you've made to us. And we need  
2 you, to the best of your ability, to uphold that  
3 responsibility.

4 And yet I don't want to interfere with  
5 someone's life expectations, where they are really  
6 instead of concentrating, as you heard from part of  
7 the opening statement yesterday, there's going to be a  
8 lot of evidence that you will need to be concentrating  
9 on. And we don't want your mind wandering somewhere  
10 else. We want you thinking about the evidence that  
11 you are hearing.

12 So as I indicated, reluctantly, the Court will  
13 release you.

14 Now, while I'm saying that, we don't have  
15 anybody else that thought of something or something  
16 has come up that you need to bring to the Court's  
17 attention at this time, do you?

18 All right. You're excused.

19 JUROR BAUER: Thank you.

20 THE COURT: And why don't we have everyone  
21 move down one seat.

22 All right. Very well, counsel for the  
23 plaintiff, you may resume your opening.

24 MR. WOBBROCK: Thank you, Your Honor.  
25

Plaintiff's Opening Statement

11

FURTHER OPENING STATEMENT

1  
2  
3 BY MR. WOBBROCK:

4 Well, good morning, everyone. And just so if  
5 you wonder, the judge was involved in a criminal  
6 sentencing, and that's what took long. And one of the  
7 lawyers representing his client had some things to  
8 impart to the Court, and it was a very serious matter.  
9 We weren't doing anything but what needed to be done.

10 I tell you that in part because I didn't have  
11 time to jump in and set this up. We started with a  
12 stack of exhibits about like that (indicating) and  
13 we're down to this. So I should be able to take you  
14 through this evidence and what we will prove fairly  
15 quickly now.

16 If you will recall, I had skipped over Item 5  
17 down to the Merit Light fraud, and I went back to Item  
18 5, defendant's suppressed research. And we talked  
19 about it yesterday afternoon, the INBIFO laboratory in  
20 Europe which they decided to buy, so they could do  
21 research outside of this country, and not generate any  
22 paper that could be discovered and put before people  
23 like yourselves. They actually bought that laboratory  
24 because they said it had less risk.

25 And you saw how Dr. Osdene, one of the

Plaintiff's Opening Statement

12

1 Research & Development doctors, said in that note,  
2 "Send it to my home and I'll destroy that paperwork."  
3 Now, you may wonder who really is Dr. Osdene and  
4 you've seen several documents with his name. This is  
5 an organizational chart which, again, is from Philip  
6 Morris documents from the files. And it shows that he  
7 is the director of research, T.S. Osdene, I've circled  
8 his name.

9 And Dr. Dunn, who you've seen so many times,  
10 is right down here, works under him. And you recall

11 Dr. Osdene is the one who said, "Send it to my home  
12 and I'll destroy it." We talked about the addiction  
13 research, and the addiction research that they had  
14 done, and how they knew that nicotine was essential to  
15 their product.

16 Let me show you another document to  
17 Dr. Wakeham. This is back on that old carbon paper  
18 stuff again. This little red tag is the one I put  
19 there. Of course, the yellow highlighting is what I  
20 put there.

21 This is February 19th, 1969. This is to  
22 Dr. Wakeham from Dr. Dunn, and this is called, "Jet's  
23 Money Offer." What does that mean, "Jet's Money  
24 Offer"? Well, there's a fellow by the name of Jet,  
25 J-e-t, he works for Philip Morris. And he was

Plaintiff's Opening Statement

13

1 advocating that they get some more money for some of  
2 the things that they wanted to do.

3 And in here it says, "Who can be against more  
4 money?" This is kind of a corporate budgeting. And  
5 this is what Dr. Dunn says to Dr. Wakeham. "I would  
6 be more cautious in using the pharmonic-medical model.  
7 Do we really want to tout cigarette smoke as a drug?  
8 It is, of course, but there are dangerous FDA  
9 implications to having some conceptualization go  
10 beyond these walls."

11 These walls, where I put the red marker, means  
12 the walls of Philip Morris. You folks are now on the  
13 inside. You now see what they're talking about inside  
14 Philip Morris in 1969. They don't want nicotine to be  
15 considered a drug. The pharmonic, meaning  
16 pharmacological, medical model, because they're  
17 worried about the FDA getting involved, the Food and  
18 Drug Administration, the part of our government that  
19 regulates drugs. This is Exhibit 98.

20 So they're suppressing addiction issues. They  
21 know that they've got a drug. They know from the  
22 other documents that we've seen that it's addictive,  
23 and they don't want that to come out either. I think  
24 you're going to hear eventually that, you know, these  
25 are just rogue employees that were making these kinds

Plaintiff's Opening Statement

14

1 of things about "bury the study," the one we saw last,  
2 the last document yesterday, "Let's bury that study  
3 about comparing nicotine to morphine and caffeine. If  
4 it turns out the wrong answer, let's bury it. Let's  
5 destroy documents from Europe."

6 You know, these are rogue employees. Well,  
7 the truth is these are very high-up individuals.  
8 These are individuals who make policy. These are the  
9 ones who set the culture of this corporation. You are  
10 about to see a document authored by a fellow by the  
11 name of Seligman. Let's look at where he is in the  
12 hierarchy here.

13 Research & Development Department, vice  
14 president, R.B. Seligman. And here's Dr. Wakeham over  
15 here, who we saw on videotape, just one notch above.  
16 And there's other individuals, Osdene, who you just  
17 saw, is down below Seligman. And a fellow that you're  
18 going to hear from later on in the case, a former  
19 insider who worked for the company, William Farone,  
20 Dr. Farone, on the same level as Dr. Osdene, the one  
21 that said, "Send it to my house and I'll destroy it

22 from Europe."

23 Now, I'm going to show you a document authored  
24 by Mr. Seligman. This is March 31st, 1980, on Philip  
25 Morris letterhead, copy to the president of the  
Plaintiff's Opening Statement 15

1 corporation. Robert Seligman, Ph.D, vice president,  
2 Research & Development.

3 Here's his signature at the bottom. Let's see  
4 what he has to say. This is to Alex Spears, the  
5 president or if not the president, a very high up  
6 individual in the P. Lorillard Company, another of the  
7 big six cigarette companies. This goes right along  
8 with what I told you about the gentlemen's agreement,  
9 the things we're not going to study. We don't want to  
10 generate paper. We don't want to give any evidence  
11 that we might find out that cigarettes and smoking is  
12 related to disease, particularly cancer.

13 "Dear Alex: Mr. J.C. Bowling of our New York  
14 office asked that I send you recommendations for  
15 industry research which we prepared last year. To  
16 that end, you'll find attached a list entitled,  
17 'Potential Long-term Scientific Studies,' which  
18 Dr. Osdene and I generated early last year.  
19 Additionally, I have added a list of three subjects  
20 which I feel should be avoided.

21 "Potential Long-term Scientific Studies," and  
22 I'm not going to go through all these. "Validation of  
23 new short-term bioassays," meaning tests, "versus  
24 long-term skin painting and inhalation." Let's do  
25 short-term tests versus long-term tests. And you'll  
Plaintiff's Opening Statement 16

1 have this document, it's Exhibit 202.

2 "Skin painting in germ-free animals. The  
3 effect of environmental and other factors on skin  
4 painting and/or inhalation." If you reflect back  
5 probably to two or three hours of what we talked about  
6 yesterday, what did I show you in the very beginning?

7 The evidence that we will put before you is  
8 that Frank Statement. Remember, they said that they  
9 would study and get to the bottom of the smoking and  
10 health issues; that their customers' health was  
11 paramount to every other.

12 The cover letter just said, "In addition there  
13 are three subjects that we're going to avoid." What  
14 do you think they are? It's the next page. What do  
15 you think they are? Here's the evidence.

16 "Developing new tests for carcinogenicity."  
17 Developing tests to determine what causes cancer,  
18 that's to be avoided, violating the very promise that  
19 they made to the American people.

20 "Attempting to relate human disease to  
21 smoking. Avoid that subject." The very promise,  
22 we're going to get to the bottom of it. We're going  
23 to find out.

24 Yet this document says, "We're not even going  
25 to study it. We're going to avoid it," from one  
Plaintiff's Opening Statement 17

1 corporation to another. From the vice president, one  
2 notch down from Helmut Wakeham.

3 "And avoid conducting experiments which  
4 require large doses of carcinogen to show the  
5 addictive effect of smoking." Don't do this. This is  
6 our gentlemen's agreement. And as I said, that's

7 Exhibit 202, so that's the third item on this list.  
8 The concealed cancer research. They did it, they did  
9 it in Europe and they were going to destroy it, and  
10 they wouldn't even do it here.

11 Now, what about CTR? You're going to hear  
12 that CTR did all these wonderful things, and the  
13 evidence will be from our side of the case that it was  
14 a shield and a front, and if they ever got close to  
15 the bone or if they ever got close to the issue, they  
16 killed it. They studied things, but they studied  
17 things that didn't have much importance. And if they  
18 did include a few things, so they could say as a  
19 shield before you people, "We did some important  
20 things," but the majority of it was not.

21 You will hear from experts who will tell you  
22 about that, who studied the evolution of science in  
23 this regard, who know their documents, and know that  
24 they really weren't serious, that it was a shield and  
25 a front.

Plaintiff's Opening Statement

18

1 This is to Dr. Seligman from Dr. Dunn again,  
2 1980, Philip Morris interoffice correspondence, so  
3 this is a little longer. And I'm going to put this  
4 up. It is all kind of compact, so you can see it  
5 here. Maybe you can follow along here.

6 This is called the nicotine receptor program.  
7 To Dr. Seligman from Dr. Dunn. "In responding to your  
8 inquiry, I am going to first address the more  
9 inclusive topic of the psychopharmacology of  
10 nicotine."

11 What's psychopharmacology? How nicotine works  
12 pharmacologically, meaning the chemical reactions in  
13 the brain on the psyche, on your psychology, the  
14 psychopharmacology. There will be a pharmacologist  
15 here to tell you more details about that. I am not  
16 going to read the whole thing because it's a long  
17 document, but we'll just go right to the issues here.

18 "The psychopharmacology of nicotine is a  
19 highly vexatious topic. It is where the action is for  
20 those doing fundamental research on smoking and from  
21 where most likely will come significant scientific  
22 developments profoundly influencing the industry."

23 In other words, addiction, that's where the  
24 action is, according to Dr. Dunn.

25 "Yet, it is where our attorneys least want us

Plaintiff's Opening Statement

19

1 to be for two reasons." It is important to have these  
2 reasons expressed and distinguished from one another.

3 "One, the first reason is the oldest and is  
4 implicit in the legal strategy employed over the years  
5 in defending corporations within the industry from  
6 claims of heirs and estates of deceased smokers."

7 Let me stop right there. That's what this  
8 case is. This is a claim by the heirs of a deceased  
9 smoker, and they say, "That's where our attorneys  
10 least want us to be." Let me read that again.

11 "The first reason is the oldest and is  
12 implicit in the legal strategy employed over the years  
13 in defending corporations within the industry from  
14 claims of heirs and estates of deceased smokers." The  
15 reason? Let's go up here.

16 "It is where the action is for those doing  
17 fundamental research and smoking and from where most



18 likely will come significant scientific developments,  
19 profoundly influencing the industry, yet it is where  
20 our attorneys least want us to be for two reasons.  
21 The first reason is the oldest and is implicit in the  
22 legal strategy employed over the years in defending  
23 corporations within the industry from claims of heirs  
24 and estates of deceased smokers."

25 This is the line, this is the official line  
Plaintiff's Opening Statement 20  
1 which you folks now are on the inside having these  
2 secret, formerly confidential and secret documents,  
3 now revealed.

4 "We, within the industry, are ignorant of any  
5 relationship between smoking and disease. Within our  
6 laboratories, no work is being conducted on biological  
7 systems." That's the official line. This is Exhibit  
8 200, and I am sure you will have an opportunity to  
9 discuss this and review it in greater detail.

10 Let's go down to the second reason. "Which  
11 brings us to the second concern of our attorneys,"  
12 remember, two reasons. "This is the more recent  
13 concern arising from increasing favorable prospects  
14 for the success of a legislative effort to transfer  
15 authority for the regulation of tobacco manufacture to  
16 a federal agency, FDA, Food and Drug Administration,  
17 known to have interests and powers antithetical,"  
18 meaning in opposition, opposed, philosophically  
19 opposed, "to the interests of the industry."

20 "Any action on our part, such as research on  
21 the psychopharmacology of nicotine, which implicitly  
22 or explicitly treats nicotine as a drug, could well be  
23 viewed as a tacit acknowledgment that nicotine is a  
24 drug. Such acknowledgement, contend our attorneys,  
25 would be untimely. Therefore, although permitted to

Plaintiff's Opening Statement 21  
1 continue the development of a three-pronged program to  
2 study the drug nicotine, we must not be visible about  
3 it."

4 Keep it secret. "Our attorneys, however, will  
5 likely continue to insist upon a clandestine effort in  
6 order to keep nicotine, the drug, in low profile."

7 Clandestine. Remember what that word means?  
8 Secret. Clandestine means secret.

9 And that gets us to a point that I would ask  
10 that you keep in mind as we prove it to you over and  
11 over again in this case, CTR, TI, and TIRC, were a  
12 front and a shield. The research done by those  
13 organizations was lawyer driven. It was litigation  
14 concern. It was not a search for the truth as The  
15 Frank Statement promised.

16 The evidence will be that it was a front and a  
17 shield for litigation purposes to keep the truth from  
18 people like yourselves and juries around this country.  
19 It was a lawyer front.

20 "Here" is referring to the footnote here on  
21 this letter, these fellows are concerned, deeply  
22 concerned, about the lawyers involved in every aspect  
23 of their so-called scientific investigation. And  
24 referring to "here," this footnote. "Although our  
25 counselors have perhaps not been fully apprised,"

Plaintiff's Opening Statement 22  
1 that's what they call lawyers, "have perhaps not been  
2 fully apprised of the relevance to the industry of the

3 new developments in neurosciences, footnote, perhaps  
4 they should be apprised, see attached box." That's  
5 what I am going to show you in a minute, "I am  
6 confident that were they so they would concur with us  
7 on the need to stay abreast of developments."

8 As long as it is secret. Stay abreast of  
9 developments, but keep it secret. What our lawyers  
10 should know about the neurosciences and PM R & D.  
11 Again, this is all part of Exhibit 200.

12 "PM sells cigarettes. Cigarettes deliver  
13 nicotine. Nicotine probably delivers change at the  
14 synapse in the central nervous system."

15 You're going to have a pharmacologist come in  
16 here and draw a synapse for you and show what it  
17 means, and show you what this is about. This is how  
18 the brain works.

19 "The synapses affected are yet to be  
20 identified. The nature of the change, histochemical,  
21 neuroelectrical is yet to be determined. Even the  
22 manifestation at the psychological level, which we  
23 infer the smoker is seeking, is yet to be specified."

24 In other words, they know it affects people.  
25 They know it makes people addicted. They don't

Plaintiff's Opening Statement

23

1 understand precisely how, but they know it works, and  
2 they want to investigate more, but they want to keep  
3 it a secret.

4 And they talk down here at the end, "On the  
5 one hand, we are manipulating the structure of the  
6 nicotine molecule."

7 They are manipulating the structure of the  
8 nicotine molecule. Remember, we talked about pH  
9 adjustment, making it more alkaline, making it more  
10 basic is the term.

11 "On the one hand, we are manipulating the  
12 structure of the nicotine molecule; while on the  
13 other, we look at the nicotine likeness of these  
14 altered molecules as they affect animal behavior," and  
15 you'll have a chance to study this more.

16 By the way, this copy is stamped on the back  
17 Dr. Osdene. Not only was this sent from -- to  
18 Dr. Seligman from Dr. Dunn, but by stamping it on the  
19 back, Dr. Osdene received it also. They were all in  
20 on this.

21 Well, come on, lawyer, how much were the  
22 lawyers really involved? Were they really that  
23 involved or were these scientists trying to put it off  
24 on somebody? Did the lawyers really call the shots?  
25 Remember, we talked about Shook, Hardy & Bacon, that

Plaintiff's Opening Statement

24

1 law firm that represented Philip Morris? They  
2 represented them in this situation, advising them, not  
3 in court at this time, but about some research.

4 This is Exhibit 234. This is Shook, Hardy &  
5 Bacon stationery. And this is to one of their lawyers  
6 from another lawyer. "Enclosed please find a copy of  
7 a memorandum we discussed." What's this about?

8 "Confidential." Now, you're really on the  
9 inside. You're in communications between a lawyer and  
10 a client, "Confidential Attorney Work Product, For Use  
11 of Counsel Only." This is a long document, I'm going  
12 to skip to the end, but I want to show you what it's  
13 about.

14 "This paper by DeNoble, et al.," DeNoble is  
15 one of their researchers, "reports an attempt to  
16 isolate the predominant anatomical brain areas to  
17 which nicotine acts." I'm sorry if I didn't tell  
18 you. This is Exhibit 234. This lawyer writes this  
19 memo and he analyzes this research.

20 And he says, "However, before the group  
21 experiences exposure to the task under the conditions  
22 of the drug, one should or could also show a behavior  
23 environmental tolerance, i.e., learning of a task  
24 particular to a particular situation." You will find  
25 out why that's important.

Plaintiff's Opening Statement

25

1 "The study by DeNoble, et al., was of the  
2 effect of nicotine, and of the effect of the nicotine  
3 antagonist mecamlamine on a particular pattern of  
4 food reinforced lever pressing in rats."

5 What they did is they put a canula or a tube  
6 into the brain of a rat and they fed nicotine down  
7 that canula into the brain, and then they set up a  
8 situation where the rat could voluntarily pull a lever  
9 and give him or her more nicotine, and whether the rat  
10 liked to do that or not was something they studied.

11 And they used this antagonist, remember we  
12 talked about antagonist yesterday? Dr. Abood was  
13 developing a nicotine antagonist, and they'd block  
14 that and they'd see if the rat would go pull the lever  
15 some more, letting them know whether the rat liked  
16 nicotine.

17 With this antagonist mecamlamine, the  
18 nicotine blocker, they were able to run these kinds of  
19 experiments. Referring to another one, these were all  
20 different experiments. This was a study by DeNoble,  
21 et al., of the response suppressing effects of  
22 nicotine, and their elimination by administration of  
23 mecamlamine. I don't know if I am saying  
24 mecamlamine right, but close enough for our purposes  
25 now.

Plaintiff's Opening Statement

26

1 "This was a study by DeNoble, et al., of lever  
2 pressing in rats, such that the presses led to  
3 contingent nicotine infusion." That is another study.  
4 He's going through the studies by DeNoble.

5 "Despite the authors' position regarding  
6 apparent lack of physiological dependence," meaning  
7 DeNoble, "their overall results are extremely  
8 unfavorable. The major reasons are few people, if  
9 any, accept the demonstration of reinforcement  
10 capacities of a drug -- that demonstration of  
11 reinforcement capacities of a drug is sufficient to  
12 label that drug addictive.

13 "However, many people do use that as a primary  
14 criterion for assessing the abuse liability of a drug.  
15 This research, such as this, strengthens the adverse  
16 case against nicotine as an addictive drug. The  
17 addiction view of cigarette smoking posits that  
18 cigarette smoking is influenced by circulating levels  
19 of blood nicotine.

20 "As with the previous point, this serves to  
21 strengthen the adverse case of cigarette smoking as an  
22 addiction."

23 I am going to go right to the end here now,  
24 the conclusion. So we've seen comments now on four

25 different studies by the lawyer, one lawyer to  
Plaintiff's Opening Statement 27

1 another.

2 "Research engaged in, as well as some possibly  
3 under consideration by Philip Morris, has undesirable  
4 and dangerous implications for litigation positions  
5 the industry takes in regard to smoking behavior. The  
6 pharmacological nature of the research implies  
7 strongly a view of the importance of nicotine.

8 "What is worse, research reports under Philip  
9 Morris' sponsorship contain claims of physiological  
10 tolerance to nicotine, as well as claims of  
11 unequivocal demonstrations of reinforcement by  
12 nicotine in animals.

13 "This kind of research is a major tool of our  
14 adversaries on the addiction issue. The irony is that  
15 the industry sponsored research is honing the tool.  
16 In the final analysis the performing and publishing of  
17 nicotine-related research clearly seems ill-advised  
18 from a litigation point of view."

19 And the evidence will be that Dr. DeNoble's  
20 work was shut down immediately after that. Within 24  
21 hours, his lab was closed and everything was removed.

22 Item 5 on that list shows you through the  
23 concealment of the INBIFO research, the addiction  
24 research, the cancer research, and the use of CTR, the  
25 front and a shield, with lawyer-driven concerns, not  
Plaintiff's Opening Statement 28

1 truth concerns, litigation concerns, not truth  
2 concerns, that Philip Morris suppressed research after  
3 promising to the American people that they would do  
4 just the opposite, that they would get to the bottom  
5 of this.

6 All right. Folks, there are three claims that  
7 we are presenting to you and the way this works is  
8 under the law, the claims set forth different areas of  
9 the law that the law allows recovery. But that's not  
10 to say that you find in one area, and then the other,  
11 and then the other, it's three times that amount.  
12 There is one set of damages. So three claims,  
13 sometimes they're called counts, one death.

14 The first one is negligence. You're going to  
15 hear more about that from His Honor, and instructions,  
16 but I think what I am allowed to tell you is  
17 negligence means they did not behave as a reasonable  
18 company under the circumstances.

19 Let me give you some examples. Some of you  
20 remember Dial soap. Some of you remember Phisohex.  
21 Maybe you don't, it has been a long time. They had  
22 some chemical in it called hexachlorophene, and when  
23 there was a suspicion that it might cause cancer, that  
24 was removed. You're going to hear from an expert who  
25 worked in the industry, that contrary to what this  
Plaintiff's Opening Statement 29

1 defendant did, the reasonable care under the  
2 circumstances is to behave like that: To test your  
3 product on humans, and when there is a suspicion that  
4 there is a problem, as there was as early as 1958,  
5 more than a suspicion.

6 In 1954, the Wynder Graham studies showed a  
7 causal relationship, maybe indirect, maybe direct,  
8 between mice and the mouse painting studies. You  
9 don't start slicing and dicing and emphasizing what is

10 not known. You start getting to the answer. You  
11 start trying to find the answer. That's what a  
12 reasonable corporation does, and you will be asked to  
13 evaluate their behavior in light of that.

14 What does a reasonable corporation do? You  
15 will hear from someone who has worked at Philip  
16 Morris, Dr. Farone, again, that in his former  
17 employment, when he worked at Lever Brothers, they did  
18 what a reasonable corporation would do: They tested  
19 products, they tried to find out what was carcinogenic  
20 in the products, and when they found out, they dealt  
21 with it. They removed it. They took care of it.

22 The product is unreasonably dangerous. It's  
23 unreasonably dangerous because you don't expect a  
24 company to hide information, especially after they  
25 promise not to. The product is unreasonably dangerous

Plaintiff's Opening Statement

30

1 because it does not meet the reasonable expectations  
2 of a consumer, particularly the Merit Light cigarettes  
3 that delivered just as much tar and nicotine as those  
4 cigarettes that they attempt to replace, the so-called  
5 higher delivery cigarettes. They did not need to call  
6 those low-tar cigarettes. They were not required to  
7 do that. They knew they didn't deliver that.

8 The last claim is fraud. If I sell you a car,  
9 I tell you it has 300,000 -- excuse me, I tell you it  
10 has 100,000 miles on it, it has 300,000 miles on it, I  
11 know it, I don't tell you the truth, that's fraud.  
12 You relied upon what I told you.

13 In this case, there was an assumption of a  
14 duty to tell people everything. They told people that  
15 they were going to cooperate with the government and  
16 get to the bottom of the smoking and health issue.  
17 Instead, they gave them half-truths. They kept  
18 telling them and creating doubt rather than denying  
19 it, that they don't know the answer. They knew the  
20 answer. They emphasized what wasn't known instead of  
21 what was known.

22 They promised this to the American people.  
23 They communicated this to everyone. And you'll see  
24 from the news releases this was a regular practice.  
25 Any time information would come out about smoking and

Plaintiff's Opening Statement

31

1 health, they would provide the psychological crutch  
2 for those that were addicted and say, "But the other  
3 side of it is we need more research," knowing all the  
4 time, knowing all the time, the connection between  
5 smoking and lung cancer.

6 You are going to hear about Michelle Schwarz.  
7 You are going to hear she died at age 53. You are  
8 going to hear from her treating doctor, the one who  
9 took care of her in her last days, how ill she became.  
10 And how she fought so hard to try and beat this  
11 disease, and how this tumor that developed in her  
12 lung, then broke off in a small few hundreds of cells  
13 and traveled to her brain and caused the tumor to grow  
14 there.

15 But the tumor in the lung was first caused by  
16 cancer from smoking. And that spread then to her  
17 brain and ultimately caused her to die. You'll hear  
18 from the expert that the cigarettes she smoked were a  
19 substantial, contributing factor, particularly those  
20 in the last eight years of her life, the Merit

21 cigarettes that she started in 1976, when they first  
22 came out, those are what caused the cancer which led  
23 to her death.

24 Now, we talked in voir dire about the two  
25 different kinds of damages: Compensatory damages and  
Plaintiff's Opening Statement

32

1 punitive damages. Compensatory damages are the  
2 medical bills, and I think you are going to hear that  
3 they're about \$128,000. That's the easy part. That's  
4 what the law provides in a wrongful death case,  
5 medical bills, part of it.

6 The law provides as set by our legislature,  
7 our legislature sets forth what can be claimed in  
8 these cases. You can't just ask for anything you feel  
9 like. You have to claim what the legislature allows,  
10 and the legislature allows the loss of society and  
11 companionship.

12 And that is perhaps the biggest loss in this  
13 case. And it is going to be up to you folks to do  
14 something that is admittedly difficult to put a number  
15 on that. You will be evaluating the loss of four  
16 people: Mother, Shirley, who is now in her middle  
17 70s, who was a smoker, and her father was a smoker. I  
18 think I told you that.

19 Michelle Chuck, that was her maiden name,  
20 C-h-u-c-k. That was her only daughter. And as she  
21 ages she is without someone who you will hear, they  
22 considered themselves the best of friends. They had  
23 an extraordinary relationship.

24 And you'll hear about Michael and Paul. Paul  
25 is 35, he is an architect. Michael is in the software  
Plaintiff's Opening Statement

33

1 business, just had what would have been Michelle  
2 Schwarz's granddaughter within the last month and a  
3 half. Michael is 30 and Paul is 35. And you'll hear  
4 about their loss. And how Michelle Schwarz was a  
5 super mom.

6 And you'll hear about Richard and his loss,  
7 and how his loss means so much to him, in these days  
8 when he is ill, when it is difficult for him to get  
9 through the day in a house where he lives by himself.  
10 And how Michelle Schwarz was the center of his life,  
11 and kept that family as a unit through thick and thin.

12 When he first became ill, it was stressful  
13 upon her, and, as I mentioned, she had a period of  
14 time of a difficulty in alcohol. But together  
15 sometimes people say the adversity to a family brings  
16 that circle tighter, and that's what it did. Together  
17 they licked that alcohol problem that she had, but  
18 they couldn't lick the smoking problem.

19 As much as she quit, she couldn't make it  
20 succeed. As much as she loved them. As much as she  
21 wanted to do for them, she was trapped in that  
22 addicted body and she couldn't make it work, but she  
23 chose to quit. Why did PM, why did the defendants in  
24 this case choose this path? Why did they choose this  
25 path when faced with the alternatives that they could

Plaintiff's Opening Statement

34

1 have chosen? What was their motivation when faced  
2 with the smoking and health issues?

3 I am going to show you a document that answers  
4 that. This is Exhibit 404. This is a long document.  
5 A lot of it doesn't have anything to do with this

6 issue. This is Product Evaluation Division, R & D  
7 Department, Philip Morris, January 23rd-24th, 1984.

8 They talk about the issues facing their  
9 industry. "Product development strategies.  
10 Challenges: It is increasingly difficult to gain  
11 share," meaning market share, "by the means we have  
12 been using for the last 30 years.

13 "Industry growth is in increasing jeopardy due  
14 to, A, perceived effects of smoking on the health of  
15 the smoker; and, B, perceived effects of smoking on  
16 health and rights of the nonsmoker."

17 C was not relevant to this case.

18 "D, the cost of smoking. Even if we could  
19 continue the share increase record we have had, that  
20 would eventually be self-defeating without renewed  
21 industry growth."

22 They need to get more smokers and are having a  
23 harder time. Why? Because of perceived effects of  
24 smoking on the health of a smoker. So what did they  
25 decide? What were their alternatives? Well, they

Plaintiff's Opening Statement

35

1 talked about several alternatives. I'm going to save  
2 the last one, and you can judge from the facts which  
3 alternatives they chose.

4 "Short term, forget about low technology, wide  
5 distribution, general appeal cigarettes. Industry  
6 marketing" -- these are their responses to the  
7 challenges, "forget about low technology, wide  
8 distribution, general appeal cigarettes. Industry  
9 marketing is too sophisticated and the market is too  
10 fractured to allow anyone an advantage in that area."  
11 Then the other one is, "Go after small markets." I  
12 won't read the whole thing.

13 The other one is, "Develop cigarettes with  
14 unique, protectable characteristics. The long term is  
15 to develop a product which meet the challenges of the  
16 industry. The ideal product would be something which  
17 handles like a cigarette, gets used up like a  
18 cigarette, costs no more than a cigarette, produces  
19 inhaleable nonhazardous gases which satisfy smokers,  
20 and which doesn't burn. The product need not taste as  
21 good as a Marlboro."

22 Before we go any further, you're going to hear  
23 that they spend millions trying to do this. So I ask  
24 you, have you ever heard about this? They're going to  
25 tell you about something called the Accord. You have

Plaintiff's Opening Statement

36

1 some sort of an electric holder that heats tobacco.  
2 The evidence will be they have put very little effort  
3 to try and market this product. When they launched  
4 Merit in 1976, they spent 46 million dollars in the  
5 marketing effort in that year. If there had been no  
6 such marketing effort, you would have heard about it,  
7 of this other device.

8 So what did they decide to do with these?  
9 This is in their own words, in their own secret,  
10 confidential document. What did they decide to do  
11 when faced with these challenges of smoking and  
12 health? "Milk the cigarette business we have and get  
13 into something else."

14 That's why punitive damages are in order.  
15 That is the task set before you. To deter this kind  
16 of conduct, to tell other corporations, "No more. We,

the people, are not going to stand for it." And to punish them for what they've done. The concealment of documents, the concealment of research after promises, the half-truths. That's what punitive damages is designed to do, and that's why the law provides for it.

Because the only thing this corporation understands is money. That's the only thing they understand, because that's what they did it for,

Plaintiff's Opening Statement

37

money.

Now, Philip Morris has alleged comparative negligence. The defendants in this case have said this is a comparative negligence case. They have said, "Not our fault, hers." They said, "She chose not to quit." But we'll prove to you she did choose to quit. She just could not succeed. She could not succeed because of the addiction that they hooked her on. And they're saying that she chose not to follow the warning.

Well, you saw those warnings. There wasn't one when she started. And you'll hear that she was probably addicted by the time the first one hit the package, which said -- which was inadequate, which said, "Smoking may be hazardous to your health." How do you follow a warning that says it's dangerous, particularly when you are addicted. She didn't make that choice. She was addicted.

There are two real ironies here, two big ironies, and I want you to pay particular attention to this throughout the case, if you would, because here will be the evidence. Here will be the evidence, and I put this one in red because this one is truly astounding. And maybe irony is too polite a word. Maybe irony is too polite a word. Maybe nonsense is

Plaintiff's Opening Statement

38

more appropriate.

Philip Morris denies knowing what it says she should have known. Now, what do I mean by that? Well, you saw Dr. Wakeham, after the proof was evident to him, and the documents that he knew about carcinogenic substances in cigarettes, and you saw way up until 1982, Dr. Charles or Mr. Charles said, "We've got a problem."

That was handwritten, remember that? "We've got a problem. We've got to get doing something on this." And so they're saying Michelle Schwarz should have known of the dangerous nature of their product even when they were denying it. And now they're saying, "We didn't know."

Well, how do I know that? Well, there are some papers that have been filed in this court that set this out very succinctly. I am going to show you a little bit about them, and they'll be in evidence. Now, our procedures in this state allow for something called request for admissions. You can ask the other side to admit certain things.

And we asked them the following things, admit or deny this. In 1965, defendant Philip Morris agreed with the overwhelming medical and scientific consensus that cigarette smoking caused lung cancer, heart

Plaintiff's Opening Statement

39

disease, emphysema, and other serious diseases in



2 smokers, subject to and without waiving its general  
3 objections, Philip Morris refers to and incorporates  
4 its objections, in response to request Nos. 19 to 25,  
5 and the objections go on for pages.

6 Okay. The second question we asked them was,  
7 "In 1995" -- excuse me -- "In 1995, Philip Morris  
8 agreed with the overwhelming medical and scientific  
9 consensus cigarette smoking caused lung cancer, heart  
10 disease, emphysema and serious diseases in smokers."

11 And we asked them in five-year increments from  
12 '65 to '95: 1970, 1975, 1980, 1985, 1990. They filed  
13 a supplemental response and here is what it says,  
14 "Philip Morris objects to this request on the grounds  
15 that it is argumentative, that it assumes the  
16 existence of an overwhelming medical consensus, and  
17 subject to and without waiving this objection, the  
18 specific and general objections inserted in its  
19 initial response to this request, Philip Morris denies  
20 this request."

21 In 1965 -- I'll move that there for you -- in  
22 1965, 1970, 1975, 1980, 1985, 1990 and 1995, they have  
23 denied with a lot of language that cigarettes cause  
24 lung cancer. Yet they are saying that Michelle  
25 Schwarz should have known.

Plaintiff's Opening Statement

40

1 And the same thing applies to whether they  
2 agree it's addictive. They did the same lack of a  
3 straight answer, creating doubt without denying it, on  
4 and on, pages of paper, and you'll have these in  
5 evidence. You can look at them and see what they  
6 said.

7 Too hard of a problem to answer, too  
8 complicated, but she should have known. I ask you  
9 when you evaluate this evidence and you see the proof,  
10 are they applying the same standards to Michelle  
11 Schwarz as they're applying to themselves? Or is this  
12 more creating doubt without denying, more of it -- I  
13 hate to say it, a smoke screen?

14 And because they failed to disclose the truth  
15 and used misrepresentations and half-truths, they now  
16 say, again, this is the second irony, "We didn't tell  
17 her," that's what the evidence is going to be, they  
18 didn't tell her. They're not going to admit that, but  
19 the evidence is going to be, they tell her, but she  
20 should have known.

21 They won't even admit it, but she should have  
22 known. They didn't admit it until their Web site 28  
23 months ago came out. Until then they denied it over  
24 and over again. As you saw Dr. Wakeham and  
25 Mr. Bowling.

Plaintiff's Opening Statement

41

1 "Applesauce kills people." The interviewer  
2 says, "I don't know too many people dying of  
3 applesauce." He says, "Well, they don't eat enough of  
4 it. Who knows?" Creating doubt without denying it.

5 And, finally, that irony, "You were negligent.  
6 You were so bad, you bought our product. That's how  
7 bad a person you were. Therefore, it is all your  
8 fault."

9 This case is, indeed, about choices and it's  
10 about addiction. It's about the choices that Philip  
11 Morris made to conceal, mislead and perpetrate a  
12 fraud. That's what it's about: To get lawyers deeply

involved in the research. To use the CTR as a front and a shield, to protect them from people like you and justice.

It's until they get in a forum like where they stand before people like yourself on equal footing, everyone equal before the law, that they are now held accountable. The choices Philip Morris made and the addiction they encouraged affected Michelle Schwarz's ability to succeed in her choice to quit. And the question before you, is this all Michelle Schwarz's fault?

Let me answer that. We have already admitted in our papers filed with the Court, her family has

Plaintiff's Opening Statement

42

admitted that she bears responsibility, some responsibility. If you look at the defendant's own papers, you'll see that people that have smoked and become addicted, with the help of Wellbutrin, according to the scientists, they have a 10 to 12 percent chance of being successful. Maybe that is her percentage of fault.

If she hasn't died at age 53, maybe she could have tried to quit another 15 times, and maybe she could have been successful. We're not saying that you can't quit smoking. We're saying, she tried, she couldn't succeed because of her addiction.

But this is where the case does not end. This is where it begins for you. Because it is your job in assessing the evidence to apportion this fault, to look at Philip Morris's role. Does Philip Morris bear significant responsibility for her addiction? That is your job. And, fortunately, it is not my job, or the Schwarz family, but most fortunately it is not the job of Philip Morris because they will accept and do accept no responsibility in this case, zero.

So, you, as the voice of this community and the conscience of this community, expressing the judgment and concern of your fellow citizens in Multnomah County, and responding to this awesome

Plaintiff's Opening Statement

43

responsibility that you now have, will fulfill that promise that you saw in that jury orientation several days ago that said that you, the jury, are the cornerstone of this democracy. Thank you.

THE COURT: All right. Thank you, counsel.

All right. Members of the jury, we'll take our morning break at this time, so return to the jury room. Thank you very much.

(Court adjourned, Volume 5-A, at 11:15 a.m.)

\* \* \* \* \*

(Court Reporter Jennifer Wiles reported Volume 21-B.)

24

25

Reporter's Certificate

44

1 Reporter's Certificate

2 I, Katie Bradford, Official Reporter of the  
3 Circuit Court of the State of Oregon, Fourth Judicial  
4 District, certify that I reported in stenotype the  
5 oral proceedings had upon the hearing of the  
6 above-entitled cause before the HONORABLE ROOSEVELT  
7 ROBINSON, Circuit Judge, on February 5, 2002;

8 That I have subsequently caused my stenotype  
9 notes, so taken, to be reduced to computer-aided  
10 transcription under my direction; and that the  
11 foregoing transcript, Volume 21-A, Pages 1 through 43,  
12 both inclusive, constitutes a full, true and accurate  
13 record of said proceedings, so reported by me in  
14 stenotype as aforesaid.

15 A transcript without an original signature and  
16 red CSR seal is not certified.

17 Witness my hand and CSR Seal at Portland,  
18 Oregon, this 23rd day of August, 2002.

19

20

21

---

Katie Bradford, CSR 90-0148  
Official Court Reporter

22

23

24

25